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No. 85-1117

In the Supreme Court of the United States

OCTOBER TERM, 1985

ASHWOOD MANOR CIVIC ASSOCIATION, ET AL., PETITIONERS

v.

ELIZABETH H. DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Transportation's approval of a particular route for a highway in the Commonwealth of Pennsylvania was made in compliance with the mandate of Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(c), that no significant publicly owned parkland or land from any significant historic site may be used for a transportation project unless "there is no prudent and feasible alternative to using that land."

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Adler v. *Lewis*, 675 F.2d 1085 8

Arizona Past & Future Foundation, Inc. v. *Lewis*, 722 F.2d 1423 ..... 6, 8

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 ..... 5, 6, 7, 8

Coalition For Responsible Regional Development v. *Coleman*, 555 F.2d 398 7

Louisiana Environmental Society, Inc. v. *Dole*, 707 F.2d 116 8

Marple Township v. *Lewis*, C.A. No. 81-4627 (E.D. Pa. Aug. 30, 1982) 4

Monroe County Conservation Council, Inc. v. *Adams*, 566 F.2d 419, cert. denied, 435 U.S. 1006 8

Stop H-3 Ass'n v. *Dole*, 740 F.2d 1442, cert. denied, No. 84-1278 (May 13, 1985) 8, 9

Page

Statutes:

Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 931 *et seq.* 2

National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 2

42 U.S.C. 4332(2)(C) 3

49 U.S.C. 301 *et seq.* 2

49 U.S.C. 303(c) 2, 3, 5, 8

49 U.S.C. (1976 ed.) 1653(f) 2

Pub. L. No. 97-449, 96 Stat. 2419 2

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. 3a-6a) are unreported. The opinion of the district court (Pet. App. 9a-64a) is reported at 619 F. Supp. 52.

JURISDICTION

The judgments of the court of appeals were entered on October 4, 1985. The petition for a writ of certiorari was filed on December 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1963, the United States Bureau of Public Roads, the predecessor to the Federal Highway Administration (FHWA), approved federal funding for a proposal submitted by the Commonwealth of Pennsylvania to build a 21.5-mile limited access highway that would serve as a beltway

around the City of Philadelphia. The route selected for the highway is popularly known as the "Blue Route."[1] The Blue Route was approved by the federal government subject to certain conditions intended to minimize adverse impacts to property belonging to Swarthmore College and the Crum Creek Valley. Construction began in 1967. Pet. App. 11a-13a.

Subsequent to federal approval of the project, Congress enacted the Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 931 *et seq.*, recodified at 49 U.S.C. 301 *et seq.* As amended in 1968, Section 4(f) of the Act provided:

> After August 23, 1968, the Secretary [of Transportation] shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.[2]

Also enacted subsequent to the approval of the Blue Route was the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, which requires a federal

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[1]Three routes originally were considered, and they were known by the colors used to delineate them on maps.

[2]Section 4(f), formerly codified at 49 U.S.C. (1976 ed.) 1653(f), was recodified in 1983 at 49 U.S.C. 303(c). Pub. L. No. 97-449, 96 Stat. 2419.

agency to prepare an environmental impact statement (EIS) for proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). Pursuant to Section 4(f) and NEPA, an EIS and a Section 4(f) Statement were prepared in 1974 for the 16.9-mile portion of the Blue Route not yet built. The draft EIS and 4(f) Statement were submitted by the Pennsylvania Department of Transportation to FHWA and circulated for comment to the public and other federal agencies. Pet. App. 14a.

In March 1979, FHWA informed the State that federal concurrence in the final EIS would be withheld pending resolution of three issues.[3] A task force of federal and state officials formed to address the issues raised by FHWA recommended a major reduction in the scope of the project and design alterations to reduce the amount of public parklands to be taken from 81 acres to 26.8 acres. The report of the task force became an Addendum to the final EIS and 4(f) Statement. Pet. App. 14a.

2. In November 1981, Marple and Radnor Townships, Pennsylvania, filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking to enjoin further construction of the Blue Route. The townships alleged that the Addendum to the environmental documents so extensively altered the project as to require the preparation of a supplemental EIS. The townships also alleged that the federal and state agencies had failed to give adequate consideration to alternatives to the taking of parklands and historic sites as required by Section 4(f). On August 30, 1982, the district court granted the townships'

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[3]The three issues raised by FHWA related to the financial capability of the state agency, the possibility of a smaller project, and the use of public mass transportation. Pet. App. 14a.

motion for summary judgment and enjoined further construction of the Blue Route pending completion of a supplemental EIS and a supplemental 4(f) Statement. *Marple Township* v. *Lewis*, C.A. No. 81-4627 (E.D. Pa. Aug. 30, 1982). No appeal was taken from this decision.

In the Supplemental EIS/4(f) Statement, which is the subject of this suit, FHWA examined 46 potential alternate corridors that would have avoided the use of 4(f) lands. The analysis resulted in progressively more detailed and refined studies of 11 corridors that entailed the smallest number of adverse impacts. Following extensive consideration, FHWA ultimately concluded that the "Total Avoidance Alternative would have unusual impacts on the communities through which it passes and cumulative impacts of extraordinary magnitude" (Pet. App. 18a (citation omitted)). Accordingly, FHWA concluded that there was no feasible and prudent alternative to the taking of public parklands, and it approved a route—still known as the Blue Route—that was essentially the same as the former task force proposal. Pet. App. 15a-16a, 18a-19a.

3. Petitioners and others then commenced this action, claiming that the supplemental environmental studies were procedurally and substantively deficient. The district court conducted an exhaustive review of the administrative record (Pet. App. 9a-64a) and "reached the firm conclusion that the 'Secretary could have reasonably believed in this case that there are no feasible alternatives or that alternatives do involve unique problems' "; that the Secretary acted within the scope of her statutory authority; and that the actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (*id.* at 63a-64a). The court of appeals affirmed on the basis of the district court's opinion (*id.* at 4a, 6a).

ARGUMENT

The court of appeals correctly affirmed the district court's conclusion that the Secretary fully complied with all of the substantive and procedural requirements of Section 4(f). The decision below does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. Petitioners contend that the Secretary's determination that there is no feasible or prudent alternative to the Blue Route is "a direct assault upon the mandate of Section 4(f) and *Overton Park*" (Pet. 9-10). This erroneous allegation is based on mischaracterizations of the record; on a misreading of this Court's decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); and on a misunderstanding of the proper role of a reviewing court.

a. Petitioners assert (Pet. 10-11) that three feasible and prudent alternatives to the Blue Route were either ignored or summarily dismissed by respondents. The district court, after carefully considering the three alternatives proffered by petitioners, upheld the Secretary's decision. First, the district court agreed with respondents that extensive study of a route passing through one of three 75-square mile travel bands considered during the supplemental review process, Band A, "would be fruitless, and a waste of taxpayers' money," because such a route would have drawn 60% less traffic than a route through parallel bands closer to congested local roads (Pet. App. 44a-45a).[4] Second, the district court agreed that the other two alternatives suggested by

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[4]Petitioners erroneously contend (Pet. 10) that Band A was never even considered. In fact, it was merely rejected for detailed analysis early in the supplemental review process, based on the fact that a highway in that corridor would not alleviate the severe congestion on local roads closer to the Blue Route (Pet. App. 45a).

petitioners did not satisfy the "feasible and prudent" standard. A decision not to build any highway would have exacerbated already severe congestion on existing local roads and produced a stifling effect on the local economy (Pet. App. 42a). Similarly, petitioners' third proposed alternative, improving local roads, would neither alleviate congestion nor serve regional transportation needs (*ibid.*). Contrary to petitioners' assertion, therefore, the three alternatives they proffered were adequately considered.

b. Contrary to petitioners' contentions, the district court scrupulously adhered to the teachings of *Overton Park*. Indeed, in setting forth the correct standard of review, the district court quoted extensively from the very same passages in *Overton Park* upon which petitioners rely. Compare Pet. i, 9-10 with Pet. App. 20a.

Petitioners' argument also ignores the fact that *Overton Park* recognized (401 U.S. at 411) that alternatives to the use of 4(f) lands must not only be "feasible," but "prudent" as well. As the district court correctly noted, "[n]ot building a highway would certainly be feasible. * * * A feasible alternative may be found imprudent, however, if it involves uniquely difficult problems or if the cost or community disruption resulting from such an alternative reaches extraordinary magnitudes" (Pet. App. 41a-42a (citing *Overton Park*, 401 U.S. at 413, 416)). In this case, building nothing, one of the three alternatives proposed by petitioners, or simply upgrading existing local roads, still another of petitioners' alternatives, were correctly rejected, because "[a]lternatives that do not accomplish the purposes of the project may properly be rejected as imprudent." *Arizona Past & Future Foundation, Inc.* v. *Lewis*, 722 F.2d 1423, 1428 (9th Cir. 1983). The Secretary's conclusion that only the Blue

Route will accomplish the purposes of this project complies fully with the mandate of *Overton Park*.[5]

c. Once an agency has made a 4(f) determination, a reviewing court must decide whether the Secretary acted within the scope of her authority, *Overton Park*, 401 U.S. at 415, and whether the Secretary's decision was within the range of permissible choices (*id.* at 416). The court must "engage in a substantial inquiry" (*id.* at 415), but "the Secretary's decision is entitled to a presumption of regularity" (*ibid.*). The ultimate question a reviewing court must answer is whether the decision made by the Secretary was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, a determination to be measured by whether the Secretary based her decision on all of the relevant factors (*id.* at 416). Although a reviewing court must ensure that a federal agency has taken the requisite "hard look" at the environmental consequences of a proposed project (*Coalition For Responsible Regional Development* v. *Coleman*, 555 F.2d 398, 400 (4th Cir. 1977)), the

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[5]In addressing petitioners' argument that the Blue Route was approved "simply because the idea has been around for so long" (Pet. 10), the district court noted that while FHWA could not select the Blue Route merely because it had long been the chosen route, it was appropriate to consider the effects of changing the route at this time (Pet. App. 48a-49a):

> The effects on land use planning of moving the highway corridor at this point are very real effects that should not be ignored. Such a change would grossly disrupt established patterns. Considering the unique situation that this highway was approved—and construction commenced—before section 4(f) was adopted, the impacts that may be indirectly related to the longstanding expectation of a highway in the Blue Route corridor may appropriately be considered. Ignoring such impacts would be a disservice to the public. The record demonstrates that consideration of factors such as inconsistency with land use was in response to very real and immediately apparent impacts that the proposed alternatives would bring to bear on local communities.

court is not empowered to second-guess the agency. *Arizona Past & Future Foundation* v. *Lewis*, 722 F.2d at 1429; *Adler* v. *Lewis*, 675 F.2d 1085, 1094 (9th Cir. 1982).

The district court "critically reviewed the massive record in this case" (Pet. App. 63a) and "reached the firm conclusion" (*ibid.*) that the Secretary's actions were in full accordance with the mandates of both Section 4(f) and *Overton Park*. The burden was on petitioners "to establish * * * that the Secretary of Transportation had acted improperly in approving the use of parklands." *Monroe County Conservation Council, Inc.* v. *Adams*, 566 F.2d 419, 422 (2d Cir. 1977), cert. denied, 435 U.S. 1006 (1978). Accord *Louisiana Environmental Society, Inc.* v. *Dole*, 707 F.2d 116, 119 (5th Cir. 1983). That burden was not met here.

2. Contrary to petitioners' argument (Pet. 11-13), the decision of the court of appeals does not conflict with *Stop H-3 Ass'n* v. *Dole*, 740 F.2d 1442 (9th Cir. 1984), cert. denied, No. 84-1278 (May 13, 1985). Petitioners argue (Pet. 12) that factors such as "traffic congestion, safety concerns and the need to improve local roads were [found] sufficient to permit the use of protected parklands" by the Third Circuit but not by the Ninth Circuit. This supposed "conflict" is entirely fact-bound and does not warrant review by this Court.

In *Stop H-3*, the court of appeals held that two of the rejected alternatives had not been shown to be imprudent. 740 F.2d at 1450. Specifically, the court there concluded that none of the reasons advanced by the Secretary in support of her rejection of the two alternatives would have produced the "extraordinary magnitude" of disruption required by *Overton Park*. *Stop H-3 Ass'n*, 740 F.2d at 1451, 1455-1456.

The district court here initially enjoined further construction of the Blue Route based on its determination that the administrative record was inadequate to support the Secretary's conclusion that there were no feasible and prudent alternatives to the Blue Route (Pet. App. 62a). Petitioners suggest (Pet. 8) that the district court's subsequent decision to uphold the Secretary's 4(f) determination, made after "extensive additional studies and airing of public opinion" (Pet. App. 63a), was "in direct contravention of its earlier opinion." But the deficiencies found by the district court when it first reviewed the case were procedural, not substantive. Indeed, as the district court noted after its second look at the project, "[n]othing in my earlier opinion was intended to suggest that the Blue Route as then planned did not comply with all substantive federal environmental laws, or that the route would either have to be substantially relocated or not built at all" (*ibid.*). Upon reexamination, the district court held (*ibid.*) that "FHWA has adequately documented the basis for its reasonable conclusion that this project presented [the] extraordinary circumstances" necessary to justify the use of 4(f) lands. The sufficiency of the administrative record is the only difference between this case and *Stop H-3,* and that difference clearly does not rise to the level of a conflict in the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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